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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1972

No.

DR. THEODOR E. BRATRUD,

Petitioner,

vs.

FRANK J. DUNNING, as Trustee of the Estate of Maryvale Community Hospital, debtor in Chapter X reorganization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Dr. Theodor E. Bratrud, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, in the above entitled case on February 11, 1972, Rehearing En Banc, denied April 26, 1972.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and

Judgment of the Referee in Bankruptcy are unreported and are printed in Appendix 4 hereto, infra pages A23-A26, inclusive. The Opinion, Order and Judgment of the District Court, rejecting in part and modifying the Referee, are unreported, and are printed in Appendix 4 hereto, infra pages A14-A20, inclusive. The opinion of the Court of Appeals is reported in 456 F.2d 414, and is printed in Appendix 5 hereto, infra pages A34-A44, inclusive. (Portions of the record relied upon are included in a separately presented Appendix pursuant to Rule 23(f).)

JURISDICTION

The Judgment of the Court of Appeals, Ninth Circuit, was entered on February 11, 1972. A timely petition for Rehearing En Banc was denied on April 26, 1972, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS FOR REVIEW

(1) Whether § 116(1) of the Bankruptcy Act empowers the Referee in a Chapter X proceeding to either reject petitioner's executory contract for the rendition of medical and pathological services to the debtor, or to abrogate petitioner's claim for damages resulting from the Receiver's confiscation of petitioner's property, medical practice and earnings in breach of said contract.

(2) Whether Rule 53(e)(2) Rules of Federal Procedure requires the Court of Appeals to review the District Judge where, contrary to the findings of the Referee, undisputed evidence confirms that the assignment of Petitioner's pathology contract was coerced by economic duress exerted by the Bankruptcy Court Receiver.

STATEMENT OF THE CASE

Dr. Theodor E. Bratrud, petitioner, agreed to furnish medical and pathology laboratory services to the patients and medical staff of Maryvale Community Hospital for a period of five years pursuant to a written contract dated October 25, 1962. Appendix A27-A33. Due to a default in the payment of interest to its bondholders the indenture trustee instituted an action in the state court for an accounting, ancillary to which the hospital was placed in receivership, with Mr. Fred Foster appointed as Receiver thereof. Contemporaneous with the state court action several of the bondholders filed a petition in the United States District Court for the District of Arizona for reorganization of the hospital under Chapter X of the Bankruptcy Act. This petition lay dormant until November 26, 1963, when the state court receivership was dismissed and, pending approval of the Chapter X petition, Mr. Foster was appointed Receiver of the hospital by the District Court.

Based upon his personal philosphy that the hospital's best interests required it to operate the pathology laboratory rather than that such services be supplied by a private medical practitioner, Mr. Foster, while acting as a state court Receiver and continuing after his appointment as District Court Receiver, embarked upon and pursued a course of action directed against Dr. Bratrud which included among others: (as the District Judge found from the undisputed evidence):

1. Confiscation of the Doctor's equipment, supplies and pathology laboratory premises;

2. Exclusion and eviction of Dr. Bratrud from the pathology and laboratory by changing the locks thereon;

3. Revocation of Dr. Bratrud's hospital staff privileges;

4. Transferance of all of the employees on the laboratory staff onto the payroll of the hospital;

5. The appointment of Dr. Davidson, Dr. Bratrud's assistant, to take charge of said laboratory;

6. The confiscation of Dr. Bratrud's laboratory mail;

7. Appropriation of all earnings of the laboratory for services rendered to the hospital except for $3,000.00, a sum barely sufficient to pay the laboratory payroll for such periods.

All of which caused petitioner to default in payments due upon contracts for equipment within the laboratory; as well as to default on accounts payable to his suppliers; to suffer a tax lien upon his property; as a consequence of which Dr. Bratrud faced personal bankruptcy and financial ruin. (Appendix A16-A19 inclusive).

Under the compulsion of these circumstances, Dr. Bratrud on April 28, 1964 assigned his rights in the pathology contract to Dr. Judson A. Davidson, effective May 1, 1964. On June 15, 1964, Dr. Bratrud filed a petition in the Chapter X proceedings seeking to recover the sum of $30,470.95 withheld from him as aforesaid in breach of the contract during the period from August 1, 1963 through April 30, 1964. On July 24, 1964, Trustee Dunning filed a petition for the termination of the pathology contract between Dr. Bratrud and the hospital pursuant to § 116(1) of the Bankruptcy Act; and on August 11, 1964, the Referee, Russell B. Taylor, entered an Order permitting the Trustee to terminate the contract effective August 3, 1964, and further ordered Dr. Bratrud to present his claim for damages as a result of such rejection. (Appendix A1-A2).

Dr. Bratrud filed his petition for damages on May 25, 1966 (Appendix A4-A8), and an Order to

Show Cause was issued thereon directed to respondent herein as to why such damages should not be paid from the debtor's assets. Respondent moved to quash said Order on the ground pertinent here, among others, that the pathology contract had been assigned by Dr. Bratrud prior to the time for which he sought compensation and therefore he had no rights under it. The Referee conducted a hearing on June 29 and 30, 1966, at which uncontradicted oral testimony and documentary evidence was introduced.

After a lapse of two years the Referee on September 18, 1968, entered Findings of Fact and Conclusions of Law, establishing among other things that Dr. Bratrud had voluntarily assigned all of his rights in the contract to Dr. Davidson on April 28, 1964, Finding of Fact 4 (Appendix A25) and that:

> "x x x On August 11, 1964, this Court entered its order that trustee reject the alleged agreement between petitioner and said hospital." Finding of Fact No. 5 (Appendix A25)

and concluded:

> "That as of August 11, 1964, the date of its termination, the petitioner had no right, title or interest in and to said agreement of October 25, 1962 (pathology contract) and could not have been and was not damaged by its termination." Conclusion of Law No. 3 (Appendix A26)

and judgment was entered accordingly denying petitioner's claim (Appendix A26-A27).

On petition for review pursuant to § 39, §§ c, of the Bankruptcy Act (11 U.S.C. § 67, §§ 3) the

District Court rejected as "clearly erroneous", the Referee's conclusory findings that petitioner voluntarily assigned his rights to the pathology contract and that neither the Trustee nor the Debtor corporation had terminated said contract prior to Bratrud's assignment to Dr. Davidson on April 28, 1964 (Appendix A14-A15); and in its "Opinion and Order" found that Mr. Foster as Receiver in both the state court and Bankruptcy receivership had exerted such coercion and economic duress that "Dr. Bratrud was forced to assign his contract to Dr. Davidson." (Appendix A19) and found:

> "Based upon the foregoing discussion, this Court finds and concludes that the Co-Receivers breached the contract dated October 25, 1962, between Dr. Bratrud and Maryvale Community Hospital, Inc., and that the assignment of said contract by Dr. Bratrud to Dr. Davidson was involuntary and the result of economic duress exerted by the Co-Receivers. x x x"

and further fixed Dr. Bratrud's loss in accordance with the formula for liquidated damages in the contract (Part III, Paragraph 8 Appendix A32) at $90,000.00 (Appendix A20). Judgment was entered thereon on November 19, 1969 (Appendix A21-A22).

The judgment rendered by the District Court was reversed by the Court of Appeals on the sole ground that there was an authorized rejection of Dr. Bratrud's pathology contract on August 11, 1964, pursuant to § 116(1) of the Bankruptcy Act (11 U.S. C. 516(1)) which ipso facto created a cause of action under § 202 of the Bankruptcy Act; and that by reason thereof whether the assignment was voluntary or not was immaterial.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ENLARGES § 116(1) OF CHAPTER X OF THE BANKRUPTCY ACT (11 U.S.C. § 516(1) TO PERMIT REJECTION OF EXECUTORY CONTRACTS BY REFEREES IN BANKRUPTCY CONTRARY TO THE RESERVATION OF THE STATUTE VESTING SUCH POWER EXCLUSIVELY IN THE DISTRICT JUDGE.

In reliance upon what it conceived to be an "authorized" rejection of petitioner's executory contract, the Ninth Circuit has sanctioned the power to reject executory contracts by the Referee in bankruptcy contrary to the plain language of § 116(1) and the duty inclusively vested in the District Judge to do so upon appropriate request. The order of court entered on August 11, 1964, repeatedly referred to and relied upon in the decision, as effecting the rejection of Dr. Bratrud's contract, was presented to, and signed by, Russell B. Taylor, Referee in bankruptcy (Appendix A1-A2). The executory contract was not rejected by order of the District Judge as required by § 116(1) even though this prerequisite is noted in the decision at 456 F.2d 417, but utterly ignored by the Court.

There are cogent reasons why the rejection of an executory contract is not delegable. The Fifth Circuit holds in Texas Importing Company, Ltd. v. Banco Popular de Puerto Rico, 360 F.2d 582, 584 (1966).

> "While in equity receiverships failure to reject, plus affirmative conduct over a long period may show an adoption, that rule should not be applied in Chapter X proceedings. Close judicial supervision of the entire proceeding is a major tenet of Chapter X. Assumption or adoption of executory contracts may have an important bearing on the

> financial status of the debtor, and should not be implied from conduct of the trustee or debtor in possession, but should be the result only of judicial consideration.
>
> "Our conclusion is supported by the text of Collier on Bankruptcy, 14th Ed. 1965 Revision of Vol. 6, ¶¶ 3.23, pp. 576-585, and by the adjudicated cases."

and see: In the Matter of Imperial '400' National, Inc., 429 F.2d 680, 682 (3rd Cir. 1970). In the Matters of American National Trust and Republic National Trust, et al v. C. E. Loveless, et ux, 426 F.2d 1064 (7th Cir. 1970).

In this posture, the Ninth Circuit could not find:

> "As a matter of law x x x" that any "x x x cause of action under Section 202 arose on August 11, 1964, when the trustee was authorized to reject the contract."

nor could it restrict Dr. Bratrud's petition for damages to a cause of action purportedly created on said date when the Referee without jurisdiction, power or other authority signed the order permitting rejection. This proceeding before the Referee was and remains an absolute nullity and justice requires that it be adjudicated as such.

In holding that there was a valid rejection of the contract under § 116(1) the Ninth Circuit has either expanded said section of the Bankruptcy Act to provide that Referee's now have the same power as a District Judge to reject executory contracts or by inadvertence has affected the destruction of petitioner's rights to receive compensation of substantial magnitude contrary to the intent of Congress and the settled law referred to herein. In either event

the Ninth Circuit's departure from the restrictions of § 116(1) vesting in the District Judge alone, the power to reject executory contracts, calls for the exercise of this Court's supervision less the practice proliferate.

The decision has important practical implications in addition to those expressed in the Texas Importing Company, Ltd., case, supra, for if compensation may be avoided for the rejection of executory contracts by permitting receivers and trustees in bankruptcy by coercive means or the exertion of economic duress to cause the transfer of valuable rights to selected friends or others under the holding that the causes motivating the assignment are immaterial in a § 116(1) rejection, then such device will find ready acceptance thoughtout the land, to the loss and damage of the very persons sought to be protected by the Act Congress specifically designed to relieve the oppressed and economically disadvantaged.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT ON THE SCOPE OF REVIEW UNDER RULE 53(e)(2) RULES OF CIVIL PROCEDURE (28 U.S.C.).

Given the fact that a correct construction of § 116(1) did not permit the Referee to reject Dr. Bratrud's executory contract, it must be conceded that the determination of whether the Referee's Findings of Fact, Conclusions of Law and Judgment entered thereon were clearly erroneous.

Given the fact that the Referee did not have the power to reject Dr. Bratrud's executory contract under § 116(1), his Findings of Fact, Conclusions of Law and Judgment thereon, were determinable by the District Judge on the certificate of Review, as a pure question of law. Costello v. Fazio, 256 F.2d 903 (9th Cir. 1949); Diamond Nat'l Corp. v. Lee, 333 F.2d 517, 523 (9th Cir. 1964). The "clearly

erroneous" rule does not apply for there was and under the circumstance, could not be any evidence whatsoever to support the Referee's findings. Bass v. Quittner Stutman & Treister, 381 F.2d 54. Under Rule 53(e)(2), Federal Rules of Civil Procedure, Appendix 6, A47) the District Court had the power to reject or modify the Referee's findings and order and did so. (Appendix A14-A22, inclusive). The judgment of the District Court having been appealed, the question arises as to whether the Court of Appeals should review the Referee or the District Judge. The precedent in the Ninth Circiut has been to review the Referee, Farmer Bros. Co. v. Huddle Enterprises, Inc., 366 F.2d 143 (1966); Miguel v. Walsh, 447 F.2d 724 (1971). This position is in conflict with the decision of this court in United States v. Merz, 376 U.S. 192, 11 L. Ed. 2d 629, 84 S. Ct. at 644 (1964) delineating the procedures to be followed on an appeal from a judgment entered by the District Court on a Rule 53 review in a condemnation case.

> "It may 'modify' the report on the basis of the record made before the commissioners, or it 'may reject it in whole or in part or may receive further evidence or may recommit it with instructions' -- all as provided in Rule 53(e)(2). We think the District Court in each of these cases should have the opportunity under Rule 53(e)(2) to make its decision afresh, in light of this opinion. We write on a clean slate against a background of a contrariety of views among the circuits. The reports in each of these cases leave much to be desired, measured by the standards we have suggested. None of the reports should have been adopted without more by the District Court. On remand, its informed discretion will be used to

> determine whether the matters should be resubmitted in whole or in part to the respective commissioners or whether, in light of the exigencies of the particular case, the court should itself resolve the disputes on the existing records, or on those records as supplemented by further evidence."
> (Emphasis supplied.)

There is no reason to apply a different rule to the circumstances of the case at bar and fact situations similar to it, especially where a statute imposes the duty on the District Judge to reject the contract. In such case the District Judge's ability to determine whether there has been a valid rejection of the executory contract is unassailable for the power to do so is reposed in the Judge alone. There is no distinction between a District Courts' review of a Commissioner's report as in Merz, supra, as compared with a Referee's findings which are as a matter of law "clearly erroneous". The Rule in Merz is a salutory one, but needs must be made applicable to all reviews brought under Rule 53(e)(2) and not, as seems to be the prevalent view, limited to condemnation cases alone. Cf. United States v. Hilliard, 412 F.2d 174 (8th Cir. 1969) and cases cited therein.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE SCOPE OF REVIEW UNDER RULE 52 (a) AND 53(e)(2), RULES OF CIVIL PROCEDURE (28 U.S.C.).

Civil Rule 52(a) (Appendix 6 - A46) provides that findings of fact shall not be set aside unless clearly erroneous. There is a decided cleavage among the circuits as to the scope of review in the Court of Appeals where the District Court rejects the findings of the Referee and reverses his Order. The Second Circuit holds that the question is the same in

the Court of Appeals as it is in the District Court, and the Referee's findings must be accepted unless they are clearly erroneous. Morris Plan Industrial Bank v. Henderson, 51 Am. Bankr. R. (n.s.) 79, 131 F.2d 975 (2d Cir. 1942); Mergenthaler v. Dailey, 53 Am. Bankr. R. (n.s.) 279, 136 F.2d 182 (2d Cir. 1943). The Ninth Circuit; Farmer Bros. Co. v. Huddle Enterprises, Inc.; and Miguel v. Walsh, supra, is in accord with the foregoing rule.

A contrary view is taken in the Fourth Circuit, where it is the Judge's findings and not the Referee's which are reviewed by the Court of Appeals. Mountain Trust Bank v. Shiffett, 255 F.2d 718 (1958). This rule is followed in Duvall v. Barry, 103 F.2d 653 (7th Cir. 1939). 2 Collier on Bankruptcy (14th Ed.) § 25.30 at 1023 through 1032 discusses the disparity in the views with particular emphasis on the seeming inconsistent decisions of the Eighth Circuit citing Katcher v. Wood, 109 F.2d 751 (1940) and Matter of Kansas City Journal Post Co., 144 F.2d 791 (1944) as an indication favoring the Fourth Circuit view but finally stating that said circuit is "firmly in the camp of the Second Ciruit's view citing O'Reiley v. Endicott-Johnson Corp. 297 F.2d 1 (8th Cir. 1961); Gross v. Fidelity and Deposit Co., 302 F.2d 338 (8th Cir. 1962); Employers Mut. Cas. Co. v. Hines, 309 F.2d 806 (8th Cir. 1962).

However, since Merz, supra, the Eighth Circuit in United States v. Hilliard, supra, albeit a condemnation case, squarely supports the Fourth Circuit's pronouncements in United States v. Twin City Power Co., 248 F.2d 108, 112 (1957) and quotes from a similar holding of the Tenth Circuit in United States v. Waymire, 202 F.2d 550, 553 wherein it is flatly stated:

> "We review the District Judge, not the Commissioners; and under Rule 52(a) we may not set aside his findings unless they are

clearly erroneous."

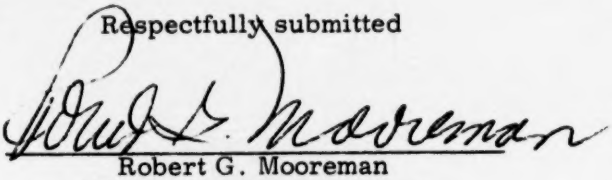
Accord O'Brien v. United States, 329 F.2d 949 (5th Cir. 1968).

The conflict among the circuits will remain until settled by the Supreme Court; or this Court specifically states that the rules laid down in United States v. Merz, supra, apply to all cases falling within the ambit of Rule 53(e)(2), supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and Opinion of the Ninth Circuit.

Respectfully submitted



Robert G. Mooreman
100 West Washington Street
Suite 1455
Phoenix, Arizona 85003
Attorney for Petitioner

Herbert Mallamo
716 Luhrs Building
Phoenix, Arizona 85003
Of Counsel

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Appendix 1:

ORDER PERMITTING TRUSTEE TO REJECT ALLEGED EXECUTORY CONTRACT A1

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PETITION BY THEODOR E. BRATRUD FOR ORDER TO SHOW CAUSE WHY TRUSTEE SHOULD NOT PAY DAMAGES FOR TERMINATION OF EXECUTORY AGREEMENT A4

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Appendix

(1)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN THE MATTER OF	)	
	)	Bankruptcy No.
MARYVALE COMMUNITY	)	B-9352-Phx.
HOSPITAL, INC., an	)	
Arizona Corporation,	)	
	)	
Debtor.	)	
	)	

ORDER PERMITTING TRUSTEE TO REJECT ALLEGED EXECUTORY CONTRACT

At Phoenix, in said District, on the 11 day of August, 1964.

The petition of Frank J. Dunning, Trustee of Maryvale Community Hospital, Inc., the above named Debtor, for permission to reject the alleged agreement between the Debtor corporation and Theodor E. Bratrud, M.D., dated October 25, 1962, having been heard on the 3rd day of August, 1964, and notice of said hearing having been given as prescribed by this Court in its order of July 24, 1964, to Theodor E. Bratrud, M.D., and after hearing Mr. John F. Sullivan, attorney for said Trustee, in favor of said petition, and Mr. Herbert Mallamo, attorney for said Dr. Bratrud,

NOW, upon said petition and all the proceedings had before me at the said hearing, and it appearing that the best interests of the estate require that the alleged executory contract be terminated,

IT IS ORDERED that Frank J. Dunning, Trustee of Maryvale Community Hospital, Inc., Debtor, be, and is hereby permitted to reject the alleged agreement between the said Debtor and Theodor E. Bratrud, M.D., dated October 25, 1962, and IT IS FURTHER ORDERED that said Theodor E. Bratrud, M.D., without

prejudice by reason of the foregoing, be permitted to present to this Court such claim or claims for injuries as may result from the rejection of the alleged executory agreement, and may be deemed a creditor of the estate in such amount as shall be determined proper by this Court upon further hearing of this matter.

IT IS FURTHER ORDERED that the entry of this order shall be deemed to constitute a rejection of the said alleged agreement.

DATED this 11 day of August, 1964.

/s/ Russell B. Taylor
REFEREE IN BANKRUPTCY

Copies of the foregoing Order
mailed to:

Mr. Herbert Mallamo, Attorney
for Theodor E. Bratrud, M.D.,
Luhrs Building, Phoenix, Arizona.

Mr. John G. Brennan, Attorney for
Bondholders Committee of Maryvale
Comminity Hospital, Inc., 3800 North
Central Avenue, Phoenix, Arizona.

Mr. Charles M. Duecy
44 East Indian School Road

Scottsdale, Arizona.

Securities & Exchange Commission
821 Market Street
San Francisco, California

this 12 day of August, 1964.
/s/ John F. Sullivan
Attorney for Trustee

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Appendix

(2)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation, Debtor	Bankruptcy No. B-9352-Phx.
THEODOR E. BRATRUD, Petitioner vs. FRANK J. DUNNING, as Trustee of the estate of said Debtor, Respondent	

PETITION BY THEODOR E. BRATRUD FOR ORDER TO SHOW CAUSE WHY TRUSTEE SHOULD NOT PAY DAMAGES FOR TERMINATION OF EXECUTORY AGREEMENT

TO THE HONORABLE CARL A. MEUCKE, UNITED STATES DISTRICT JUDGE:

The petition of THEODOR E. BRATRUD respectfully represents:

1. That he is a creditor in the aforesaid Chapter X proceedings by virtue of the rejection and termination of his executory contract with the Maryvale Community Hospital for laboratory services, a copy of which is attached hereto as Exhibit "A", said contract having been executed on or about October 25, 1962, under which the petitioner, as a Pathologist, agreed to conduct the Department of Pathology and provide services and supervision to meet the needs of the debtor hospital for a period of five years; that the validity of said agreement has heretofore been determined by this court by the Hon. Roger D. Foley on May 7, 1964, a copy of the Findings of Fact and Conclusions of Law being attached hereto as Exhibit "B", wherein the

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court specifically held that said agreement was, and at all times pertinent thereto, a "valid and subsisting Agreement".

2. That on or about May 11, 1964, the Hon. Roger D. Foley, Jr. entered an order approving creditors petition for reorganization and an order of referral to the Hon. Russell B. Taylor as Special Master, upon which a formal order of referral was entered on July 23, 1964.

3. That on or about July 30, 1964, Frank J. Dunning, as Trustee, petitioned (Doc. #88) this court to reject the executory agreement with Dr. Theodor E. Bratrud pursuant to Section 116, Subsection 1, of Article III, Chapter X, of the Act of Congress relating to Bankruptcy; that thereafter Roger D. Foley (Jr.), United States District Judge, entered an order to show cause authorizing the rejection of said contract and permitting respondent, Theodor E. Bratrud, to present to this court a claim for injuries which may have resulted from the rejection of said executory contract and authorizing the determination of damages; that said agreement was terminated on August 3, 1964 (Doc. #128); that sub-

sequent thereto the matter having been referred to Russell B. Taylor as Special Master and Referee in Bankruptcy, and the matter of the objections by Dr. Theodor E. Bratrud to the accounting of Fred Foster, the Chapter X Receiver, said Referee determined that in compliance with said agreement, prior to the rejection, Dr. Theodor E. Bratrud was entitled to the sum of $30,543.60, and on February 9, 1965, (Doc. #129) an order was entered directing said Trustee to pay said funds pursuant to the Findings of Fact and Conclusions of Law (Doc. #128) heretofore filed on January 28, 1965, that under the Findings of Fact and Conclusions of Law,

the Referee in Bankruptcy ordered that "the Court expressly reserves jurisdiction to hear and determine the injury and damages sustained or incurred by Theodor E. Bratrud by reason thereof" for said breach of contract.

4. That the contract of October 25, 1963, between Maryvale Community Hospital, Inc. and Dr. Theodor E. Bratrud, a copy of which is attached hereto as Exhibit "A", provided for damages for the termination thereof as follows:

> "If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss of the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on overage monthly reimbursement by the hospital to the pathologist during the year preceding the termination

of the pathologist."

5. That it appears from the records in these proceedings that the bondholders herein are the only other creditors affected by these proceedings and that 2% dividend was paid to the bondholders on or about July 20, 1965, and subsequently a 3% dividend or interest payment was paid on or about November 18, 1965, at which time the Trustee, Frank J. Dunning, alleged:

> "(b) That these bondholders represent the only unsatisfied creditors and that there are no prior creditors; that the only amounts owed by the hospital are by way of monthly accounts and all such accounts are paid to date."

6. That on or about March 21, 1966, the Trustee filed his Twenty-First monthly report as Trustee showing on Schedule "A" total assets of $3,324,532.44, including cash in bank of $103,634.43 and accounts receivable totaling $344,169.88; that

it therefore appears that upon liquidation and proof of the petitioner's damages for termination of the executory contract that there are sufficient assets in the estate to satisfy his claim as a creditor herein, the court having been previously advised on July 6, 1964, by the Trustee, Roland Wilpitz, (Doc. #66) wherein the Trustee's report and list of creditors by classification indicated "no unsecured creditors".

7. That pursuant to the provisions of the Bankruptcy Act relating to termination of executory contracts and damages therefor, the petitioner is entitled to a hearing upon the matter of said damages in accordance with the Findings of Fact and Conclusions of Law of the Referee and Special Master, wherein the Hon. Russell B. Taylor on or about

January 27, 1965, "expressly reserves jurisdiction to hear and determine the injuries and damages incurred by Theodor E. Bratrud by reason thereof".

8. That in accordance with the aforesaid pathologist agreement, the Trustee is bound to make up the financial loss to the petitioner for that period of time when he would normally be in practice, such period of time not to exceed six months and to be established as that time between which the termination of the pathologist was effected, that is, August 3, 1964, and at such time as the petitioner pathologist is able to secure new employment in his field, the amount of damages as spelled out in said contract to be fixed by the financial loss based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist; that in order to simplify the hearing on said matter, your petitioner has secured an accounting of the net funds due the laboratory

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from the hospital during its operation beginning in November, 1962, through April, 1964, a copy of the letter of Sheppard & Johnson, Certified Public Accountants, and the accounting due the laboratory for said period being attached hereto as Exhibit "C".

9. That your petitioner has been unable to secure new employment in his field because of the termination of the aforesaid agreement and that he has suffered substantial losses averaging in excess of $15,000.00 per month for a period greater than the six months period mentioned in said contract; that your petitioner has attempted to mitigate his damages by selling, assigning and transferring his interest under economic compulsion to Judson A. Davidson, M.D., the pathologist in operation of the present Pathology Department at Maryvale Hospital and that said transfer, assignment and sale was caused by the illegal restraining orders entered in

October, 1963, and subsequently on February 18, 1964, and the lengthy litigation which has ensued and is a record herein.

WHEREFORE, your petitioner prays that this court enter its order requiring the Trustee, Frank J. Dunning, to appear and show cause, if any he has, on a day certain, why the petitioner's damages should not be fixed and paid out of the assets of the estate as a creditor herein by virtue of the rejection and termination of the executory contract for laboratory services upon the submission of proofs herein.

HERBERT MALLAMO and
ROBERT G. MOOREMAN

By /s/ Robert G. Mooreman
Attorneys for Theodor E. Bratrud, Petitioner

[452]

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

THEODOR E. BRATRUD, being first duly sworn upon oath, deposes and says:

That he is petitioner herein; that the allegations contained in the foregoing petition are true and correct to the best of his knowledge, information and belief.

/s/ Theodor E. Bratrud
THEODOR E. BRATRUD

SUBSCRIBED AND SWORN to before me this 29 day April, 1966.

/s/ Mary B. Dooley
NOTARY PUBLIC

My Commission Expires:
Dec. 5, 1968

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Appendix

(3)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation, Debtor	Bankruptcy No. B-9352-Phx.

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA:

I, RUSSELL B. TAYLOR, Referee, do hereby certify that the above captioned matter was referred to me by order of the Honorable C. A. Muecke, District Court Judge, dated May 31, 1966; that in the due course of proceedings, a hearing was held on June 29 and 30, 1966, on the Petition of Dr. Theodore E. Bratrud for Order to Show Cause why the Trustee should not pay damages for the termination and breach of the executory agreement for the services of his Pathology Laboratory Department at the hospital.

STATEMENT OF QUESTION PRESENTED.

The following question arose pertinent to the said proceedings: Whether the ultimate negotiations and final sale of the Pathology Laboratory by Dr.

Bratrud to Dr. Davidson was an involuntary sale and transfer due to economic compulsion because of the acts and conduct of Fred Foster as Receiver in the State and Federal proceedings.

As set forth in my Findings, Conclusions and Judgment signed September 18, 1968, and filed September 26, 1968, I found that Dr. Bratrud voluntarily assigned said agreement to Dr.

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Davidson on April 28, 1964, and could not have been damaged by its termination.

CERTIFICATION OF RECORD BEFORE THE COURT.

I do further certify:

All proceedings, records, pleadings, minutes and exhibits set forth and described in the Designation of Contents of Record filed by Dr. Theodore E. Bratrud (Docket No. 388) and Respondent Trustee's Additional Designation of Contents of Record on Petition for Review (Docket No. 394) and the Order Authorizing Sale entered August 12, 1968 (Docket No. 371), wherein the purchaser, Good Samaritan Hospital, paid $5,100,000.00 and assumed all liabilities, contingent and actual, including the claim of Dr. Theodore E. Bratrud, which arose out of rejection and breach by the Trustee of a contract between Maryvale Hospital and Dr. Bratrud regarding the Pathology Laboratory Department.

DATED: March 17, 1969.

Respectfully submitted,

/s/ Russell B. Taylor
RUSSELL B. TAYLOR
Referee and Special Master

Appendix

(4)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of	)	
	)	
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	No. B-9352 PHX - CAM
	)	
Debtor.	)	
	)	
THEODOR E. BRATRUD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
FRANK J. DUNNING, as Trustee of the Estate of said Debtor,	)	
	)	
Respondent.	)	

OPINION AND ORDER

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law[1] entered by Russell B. Taylor, Referee in Bankruptcy on September 26, 1968 in the above captioned cause are modified in the following ways:

1. Findings of Fact Nos. two, four, seven, and eight are rejected.

2. Conclusions of Law Nos. two, three, and four are rejected.

In passing on a petition for review of an order entered by a referee, the district judge sits "in effect" as an appellate court in reviewing the findings of the referee.

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1 See Appendix A for the full text of the Referee's Findings of Fact and Conclusions of Law.

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In re Sussman (D.C.N.Y., 1950) 88 F.Supp. 230; General Order 47 of the General Orders in Bankruptcy; and Rule 53(e)(II) of the Federal Rules of Civil Procedure provide that the findings of fact of a referee or special master shall be accepted "unless clearly erroneous." See also, Matter of Roark (D.C. Ky. 1939) 28 F.Supp. 515. These provisions are applicable to Chapter X in a corporate reorganization proceeding (General Orders 37 and 52 of the General Orders in Bankruptcy) and apply to a referee's order, as distinguished from a special master's report. In re Byrd Coal Co. (2nd Cir. 1936) 83 F.2d 190.

The petitioner, Dr. Theodor E. Bratrud, and the debtor, Maryvale Community Hospital, Inc., entered into a written contract on or about October 25, 1962, whereby Dr. Bratrud was designated and employed (as an independent contractor) as Pathologist for the Hospital for a period of five years,[2] commencing from the date of the written contract. The contract was found to be "a valid and subsisting agreement; and that the same is binding upon Fred Foster, Receiver herein," by Judge Foley in his Findings of Fact and Conclusions of Law, entered May 7, 1964.

Mr. Fred Foster was appointed Co-Receiver of the Hospital in a state court proceedings on August 1,

1963 and Co-Trustee in the Chapter X proceedings in the Federal Court on November 26, 1963. Up until Mr. Foster's initial appointment, there had been no apparent turmoil between Dr. Bratrud

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2 The contract is set out in its entirety in Appendix B.

and the Hospital.

After being appointed Co-Receiver, Mr. Foster decided the agreement between Dr. Bratrud and the Hospital was not in the interests of the Hospital.

Ex. D: Foster - p. 14

When Foster could not re-negotiate Dr. Bratrud's agreement, Mr. Foster regarded his contract as being terminated.

Ex. D: Foster - pp. 15-16
Lahr - p. 95
Meyers - pp. 140-141

Mr. Foster then took steps to enforce his determination that the agreement of October 25, 1962 was terminated, even before the Court terminated the contract on August 11, 1964, pursuant to Section 116, subsection 1, of Article III, of Chapter X of the Bankruptcy Act.

In September of 1963, Mr. Foster attended an executive meeting of the medical staff at which time he called for a vote of confidence on Dr. Bratrud and a majority of those present voted "no".

Ex. D: Foster - pp. 16-17

Ex. A: Attached to Petition of Receiver for Temporary Restraining Order and Order to Show Cause filed February 24, 1964.

The testimony of Dr. Bratrud to the effect that he was never notified of the staff meeting or given an opportunity to appear to make a statement and knew nothing about it until the Hospital Administrator sent a letter advising Dr. Bratrud that his staff privileges had been revoked, has not been refuted.

Ex. E: Bratrud - pp. 142 and 144.
Foster - pp. 39-52
Foster - p. 44
Lahr - pp. 87-88.

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Other steps taken by Mr. Foster and his administrator, Mr. Powell, included

(1) placing Dr. Davidson in charge of the Pathology Laboratory

Ex. D: Foster - pp. 22 and 58

(2) transfer of Dr. Bratrud's employees to the hospital payroll

Ex. D: Foster - p. 24

(3) collecting the money for laboratory services rendered by disregarding the contract by paying Dr. Bratrud only $3000 every two weeks from which Dr. Bratrud was to pay all his expenses, including bi-weekly wages of $3000 for his employees

Ex. D: Foster - pp. 47, 49-51, and 56
Ex. F: Foster - p. 70

(4) assumed all expenses of the laboratory

Ex. D: Kolmus - pp. 122 and 126-128

(5) changing the locks on the laboratory

Tr., Vol. II, June 29-30, p. 54-55
Tr., Vol. I, June 29, pp. 123-126
Ex. D: Foster - p. 23

(6) confiscating the laboratory mail

Tr., Vol. II, June 29-30, p. 55
Tr., Vol. I, June 29, pp. 123-126.

It is thus apparent to this Court that Dr. Bratrud's contract was breached when the Co-Receiver, Mr. Foster, refused to abide by its terms and prevented the Doctor from abiding by its terms. Dr. Bratrud's cause of action arose when the contract was breached and he was prevented from fulfilling his part of the agreement.

[1044]

Dr. Bratrud had effectively been evicted from the Hospital and denied his only source of monthly income by the improper withholding of the monies due him under the Pathology Laboratory contract. As a consequence of the Co-Receiver's actions, Dr. Bratrud was faced with a tax lien, default on various equipment contracts, default on accounts payable to his suppliers, and the liklihood of personal bankruptcy and financial ruin. Therefore, acting under the compulsion of these circumstances, Dr. Bratrud was forced to assign his contract to Dr. Davidson. Dr. Davidson was the person previously selected by the co-receivers to run the Pathology Laboratory for them and who had in fact, been operating the Laboratory under an agreement with the co-receivers since the one-sided termination of Dr. Bratrud's contract. This assignment to Dr. Davidson apparently was the end result desired by the co-receivers.

Counsel for the Trustee cites us to Fruhauf Southwest Garment Co. v. United States (Ct. of Cl., 1953) 11 F.Supp. 945, for the elements necessary for economic duress:

"(1) that one side involuntarily accepted the terms of another;

"(2) that the circumstances permitted no other alternative; and

"(3) that said circumstances were the result of coercive acts of the opposite party." Supra at p. 951 Although "mere stress of business conditions does not constitute duress where the defendant was not responsible for

such circumstances," (Lawrence v. Muter Co. (7th Cir. 1949) 171 F.2d 380), it is apparent in the case before that the laboratory had a lucrative business grossing approximately $157,563 for the eight month period from August 1, 1963 to March 31, 1964.

Ex. D: Foster - p. 74

Therefore, the duress was not caused by business stress but rather by the coercive tactics of the Co-Trustee. Dr. Bratrud had no alternative but to make the assignment to Dr. Davidson, who had already entered an agreement to operate the Laboratory. As for the element of voluntariness, when one has been evicted from his place of business; had his moneys, mails, and staff confiscated; and had his entire business virtually seized and turned over to another - it cannot be said there is voluntariness and no duress.

Based upon the foregoing discussion, this Court finds and concludes that the co-receivers breached the contract dated October 25, 1962 between Dr. Bratrud and Maryvale Community Hospital, Inc. and

that the assignment of said contract by Dr. Bratrud to Dr. Davidson was involuntary and the result of economic duress exerted by the co-receivers. This Court also finds and concludes that under the terms of said contract (Part III, paragraph 8), the hospital is bound to pay damages to Dr. Bratrud in an amount equal to six times the "average monthly reimbursement by the Hospital to the pathologist during the year preceding the termination of the pathologist" which monthly average was $15,000.

Tr., April 19, 1968, p. 27.

[1046]

IT IS HEREBY ORDERED that the petitioner submit to the Court, a form of judgment in accordance with this opinion.

DATED this 18th day of August, 1969.

/s/ C. A. Muecke
C. A. MUECKE
United States District Judge

[1047]

ROBERT G. MOOREMAN
832 First National Bank Bldg.
Phoenix, Arizona 85004
252-8744
HERBERT MALLAMO
216 Luhrs Building
Phoenix, Arizona 85003
252-3611

Attorneys for Theodore E. Bratrud

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of	)	
	)	No. B-9352-Phx. - CAM
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	
	)	
Debtor	)	
	)	
THEODORE E. BRATRUD,	)	
	)	
Petitioner	)	
	)	
vs.	)	
	)	
FRANK J. DUNNING, as Trustee of the Estate of said Debtor,	)	
	)	
Respondent	)	
	)	

AMENDED JUDGMENT AGAINST FRANK J. DUNNING, AS TRUSTEE OF THE ESTATE OF SAID DEBTOR

This cause having come on to be heard as a Petition for Review concerning the claim of Dr. Theodore E. Bratrud and submitted for decision upon the evidence of record and memorandum of counsel, and the Court being fully advised in the premises and upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED as follows:

That the petitioner, Theodore E. Bratrud, recover of and against Frank J. Dunning, as Trustee of the Estate of the

[1188]

Debtor herein, the sum of Ninety Thousand Dollars ($90,000.00) as liquidated damages for the breach

of the Bratrud contract with Maryvale Community Hospital, Inc., with interest at the rate of six percent (6%) per annum from August 1, 1963, the date of the original involuntary petition for reorganization of the Debtor Corporation under the Chapter X proceedings filed herein, and petitioner's costs of action in the amount of $341.60, all pursuant to the Opinion and Order of this Court dated August 18, 1969.

IT IS FURTHER ORDERED vacating and setting aside the judgment of the Hon. Russell B. Taylor, Referee in Bankruptcy, dated April 18, 1968, at Las Vegas, Nevada.

Dated this 19th day of November, 1969.

/s/ C. A. Muecke
C. A. MUECKE, United States District Judge

APPROVED AS TO FORM:

/s/ John F. Sullivan
JOHN F. SULLIVAN

ROBERT G. MOOREMAN and HERBERT MALLAMO

By /s/ Robert G. Mooreman

[1189]

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

-0-0-

In the Matter of	)	
	)	Bankruptcy No.
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	B-9352-Phx.
	)	
Debtor.	)	
	)	
THEODOR E. BRATRUD,	)	
Petitioner,	)	
-vs-	)	
FRANK J. DUNNING, as Trustee of the Estate of said Debtor,	)	
Respondent.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause coming on regularly for hearing on the 29th day of June, 1966, before the Honorable Russell B. Taylor, Special Master and Referee, upon the petition of Theodor E. Bratrud for Order to Show Cause why Trustee should not pay damages for termination of executory agreement and the subsequent order entered on June 8, 1966; the petitioner appearing in person and by his counsel, Robert G. Mooreman; the Trustee appearing in person and by his counsel, John F. Sullivan; and Maryvale Community Hospital Bondholders' Committee appearing by its counsel, John G. Brennan; the trustee having filed his motion to quash order to show cause, and the parties having introduced evidence both oral and documentary, and the Court, having considered the same, finds the facts and states conclusions of law as follows:

FINDINGS OF FACT

1. That on or about October 26, 1962, Maryvale Community Hospital, Inc., an Arizona corporation, and Theodor E. Bratrud

APPENDIX A

[1048]

made and entered into a certain agreement in writing, wherein and whereby said respondent, Theodor E. Bratrud, was designated and employed as pathologist for said hospital for a term of five years from said date.

2. That said agreement required, and the said Theodor E. Bratrud furnished, professional services under and in accordance with said agreement for the period August 1, 1963, to and including the 30th day of April, 1964.

3. That said agreement in writing dated October 25, 1962, inter alia, on page 5 paragraph 8, provided:

> "8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the year preceding the termination of the pathologist."

4. That on April 28, 1964, Theodor E. Bratrud voluntarily assigned all of his right, title and interest in and to the said agreement of October 25, 1962, to Dr. Judson A. Davison, Pathologist, and thereafter negotiations for a new pathological contract were entered into between Maryvale Community Hospital, Inc., and Dr. Davison.

5. That on July 22, 1964, the Trustee petitioned this Court to reject said agreement of October 25, 1962, and on August 11, 1964, this Court entered its order that trustee reject the alleged agreement between petitioner and said hospital.

6. That on April 30, 1965, petitioner wrote respondent advising him that the said contract for laboratory services was terminated by mutual agreement.

7. That neither respondent nor the debtor corporation terminated the aforesaid agreement of October 25, 1962, prior to its total assignment to Dr. Judson A. Davison on April 28, 1964.

8. That the order to show cause herein issued against respondent should be quashed and the petition of petitioner, Theodor E. Bratrud, be denied.

CONCLUSIONS OF LAW

1. That the debtor corporation and petitioner, Theodor E. Bratrud, entered into an agreement dated October 25, 1962, wherein petitioner was designated and employed as pathologist for said hospital.

2. That petitioner voluntarily assigned said agreement to Dr. Judson A. Davison on April 28, 1964, which assignment became effective May 1, 1964.

3. That as of August 11, 1964, the date of its termination, the petitioner had no right, title or interest in and to said agreement of October 25, 1962, and could not have been and was not damaged by its termination.

4. That the order to show cause heretofore issued on June 8, 1966, against the respondent, Frank J. Dunning as Trustee of Maryvale Community Hospital, Inc., an Arizona corporation, debtor, is hereby quashed and the petition of Theodor E. Bratrud is hereby denied.

DATED this 18th day of September, 1968.

/s/ Russell B. Taylor
RUSSELL B. TAYLOR,
Referee in Bankruptcy

[1050]

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

-0-0-

In the Matter of	)	
	)	Bankruptcy No.
MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation,	)	B-9352-Phx.
	)	
Debtor.	)	
	)	
THEODOR E. BRATRUD,	)	
	)	
Petitioner.	)	JUDGMENT
	)	

- vs -

FRANK J. DUNNING, as Trustee of the estate of said Debtor,

Respondent.

Pursuant to the Findings of Fact and Conclusions of Law, contemporaneously filed with this Order, the Court does hereby

ORDER AND DECREE that the order to show cause in this proceeding heretofore entered on June 8, 1966, be, and the same is hereby, quashed.

IT IS FURTHER ORDERED that the petition by Theodor E. Bratrud for order to show cause why trustee should not pay damages for termination of executory agreement be, and the same is hereby, dismissed.

DATED this 18th day of September, 1968, at Las Vegas, Nevada.

/s/ Russell B. Taylor
RUSSELL B. TAYLOR,
Referee in Bankruptcy

[769]

Exhibit "A"

AGREEMENT

THIS AGREEMENT made and entered into this 25 day of October, 1962, by and between MARYVALE COMMUNITY HOSPITAL, INC., an Arizona non-profit corporation, hereinafter designated as Hospital and THEODOR E. BRATRUD, hereinafter designated as Pathologist.

W I T N E S S E T H:

WHEREAS, the hospital is desirous of establishing and maintaining a department of pathology and in connection therewith to maintain standards in the practice of pathology which will meet with the requirements of approval by the Joint Commission of Accreditation of Hospitals, the American Society of Clinical Pathologists and the College of American Pathology and

WHEREAS, the pathologist will be a physician duly licensed to practice medicine in the State of Arizona and a recognized specialist in pathology elegible for certification by the American Board of Pathology in pathologic anatomy and/or clinical pathology.

WHEREAS, both parties recognize that the practice of medicine is legally a franchise granted by the State to an individual after rigid technical training and due examination, and it is the desire of both parties that the professional services of the pathologist be made available to the patients in the hospital and to the professional staff of the hospital.

I. THE HOSPITAL COVENANTS AND AGREES AS FOLLOWS:

1. To make adequate provisions for proper and adequate space for the pathology department including but not limited to operating space for technology and personnel, storage space for supplies and pathological specimens, laboratory space, and quarters

APPENDIX B

[1051]

for the housing and maintenance of animals as may be required for clinical diagnostic and experimental procedures and to equip such space with the necessary basic equipment and facilities to maintain such

department.

2. To act as the billing, accounting and collecting agent for the pathologist for all in-patient and emergency room hospital pathology services and to maintain such books and records as are necessary to provide this service, said books and records to be made available for inspection and copying by the pathologist or his staff at such time and place as shall be mutually convenient to hospital and pathologist or his staff.

3. To provide lighting, heating, janitor service, telephone service and all basic utilities to the space provided for the pathology services.

4. The hospital will remit on the 1st and 15th of each month for the semi-monthly period just prior to each date to the pathologist 80% of all in-patient and emergency room hospital billings for laboratory services, the pathologist or his staff to run and maintain the department of pathology and laboratory as he sees fit, subject to the provisions of this agreement. The pathologist will be reimbursed based upon his records of in-patient services. Such records may be examined by the hospital periodically.

II. PATHOLOGIST COVENANTS AND AGREES AS FOLLOWS:

1. To assume the responsibility for the conduct of the department of pathology and to devote such time as is necessary to provide proper and adequate service and supervision which will meet the needs of the patients and/or the medical staff.

2. To be responsible for matters of general policy,

cedures, and the development of clinical or other research projects within the department of pathology.

3. To be responsible for the prompt performance of all laboratory examinations requested, the preparation of written reports and the retention of such materials as microscopic sections; to keep accurate and complete records, including a proper filing system.

4. To be responsible for the performance of duly authorized autopsies on hospital patients properly admitted, whose deaths are legally regarded as hospital deaths, and to make available promptly for the hospital record, the attending physician and the departmental files, reports including both gross and microscopic findings, and to preserve pertinent tissues, blocks and sections in conformity with established customs and laws at no charge to the hospital.

5. To engage such physicians and technicians and other personnel as are required for the proper functioning of the department and to be responsible for the purchase of all supplies and equipment necessary for the conduct and improvement of the pathology service.

6. To provide, without charge, such pathology services as may be required for the care of bona fide charity patients of the hospital and also that which is necessary to protect patients and personnel from communicable diseases within the hospital.

7. To provide for consultations at operations and for frozen section diagnosis and for consultation with staff physicians.

III. THE PARTIES MUTUALLY COVENANT AND AGREE AS FOLLOWS

1. For and in consideration of the services to be

rendered and the convenants to be performed by the hospital, pursuant to Section I of this agreement, the pathologist or his staff agree to reimburse the hospital 20% of the gross billings for the laboratory as and for payment of rent, lights, heat, in-patient bookkeeping and accounting, telephone service and janitor service, and basic utilities. The books and records of the hospital insofar as they relate to the income or fees produced by or earned from the laboratory or the pathologist and his staff shall be subject to the inspection and audit of the pathologist and his staff as above mentioned in Paragraph I Section 2. In the event there is any dispute between the parties hereto concerning the amount of income due and payable to either party hereunder, findings and report of a certified public accountant mutually acceptable to both parties shall be conclusive in such determination.

2. The pathologist or his staff may provide services to patients, citizens and institutions outside the hospital and any remuneration therefore shall belong entirely to the pathologist and his staff, provided, however, that such other professional activities must not interfere with services to the hospital staff and patients as designated herein.

3. The pathologist shall be known and designated as Chief of the Pathology Department and shall have status equivalent to that of any other Chief of Services within the hospital and shall be a member of the medical executive committee the same as other department heads with the pathology services to be a division of the hospital staff equal in all respects to other division of the hospital.

4. The pathologist shall be an independent

contractor

and maintain and operate the department of pathology and the laboratory exclusively under his supervision with the right to make such rules and regulations; to hire and fire personnel necessary for the operation of the laboratory and to decide all matters of policy pertaining to the department of pathology insofar as these provisions do not directly conflict with any hospital laws, by-laws, provisions, or policies.

5. The pathologist or his staff shall provide for continuing professional service.

6. This agreement shall be applicable and continued in force with any associates or assigns of the pathologist and shall be binding upon the successors and assigns of the hospital.

7. This agreement shall be for a term of five (5) years from this date and shall be deemed to be automatically renewed unless terminated in writing by either party at least 180 days prior to the renewal date.

8. If the hospital terminates the pathologist prior to the end of this agreement, the hospital is bound to make up the financial loss to the pathologist for that period of time when he would normally be in practice, such period of time not to exceed six (6) months and to be established as that time between which the termination of the pathologist is effected and such time as pathologist secures new employment in his field; said amount of financial loss to be based on average monthly reimbursement by the hospital to the pathologist during the hear preceding the termination of the pathologist.

9. Any of the matters contained in this agree-

ment may be altered from time to time by the written consent of the parties to this agreement without in any way effecting the remainder of

[1055]

this agreement.

10. This agreement shall supercede and replace any and all previous agreements entered into by and between THEODOR E. BRATRUD and the hospital.

IN WITNESS WHEREOF the parties have caused this agreement to be executed at Phoenix on the 25th day of October, 1962.

MARYVALE COMMUNITY HOSPITAL

By /s/ William E. McGee, Jr., M.D.
President

Attest:

Signature illegible
Secretary

By /s/ T. E. Bratrud, M.D.
T. E. BRATRUD, M.D.

Appendix

(5)

IN RE MARYVALE COMMUNITY HOSPITAL, INC.

456 F.2d 414 (1972)

In the Matter of MARYVALE COMMUNITY HOSPITAL, an Arizona corporation, Debtor.

Frank J. DUNNING, as Trustee of the Estate of Maryvale Community Hospital, Appellant,

v.

Theodore E. BRATRUD, Appellee.

No. 25500.

United States Court of Appeals, Ninth Circuit.

Feb. 11, 1972

Rehearing Denied April 20, 1972.

Rehearing En Banc Denied April 26, 1972.

Appeal by trustee of bankrupt hospital from a judgment of the United States District Court for the District of Arizona, C. A. Muecke, J., awarding doctor damages as a result of the rejection of his pathology contract with the hospital. The Court of Appeals held that doctor was not entitled to recover damages where the contract was found to be in full force and effect until it was rejected, and the doctor had assigned the contract to another doctor before it was rejected, even if the assignment had been involuntary because of the activities of a prior receiver.

Reversed and remanded with directions.

1. Bankruptcy Key 673

After a court has approved a Chapter X reorganization petition, trustee appointed in that proceeding must within a reasonable time recommend to the court whether to adopt or reject debtor's executory contracts, and the power to reject such contracts resides only in the judge before whom the reorganization proceeding is pending, and not in the receiver, trustee or the referee to whom the proceedings may be generally referred. Bankr.Act, § 116(1), 11 U.S.C.A. § 516(1).

2. Bankruptcy Key 673

Where executory contract of bankrupt is judicially rejected, the rejection is effective immediately and for all purposes. Bankr.Act, § 116(1), 11 U.S.C.A. § 516(1).

3. Bankruptcy Key 673

Judicial rejection of executory contract of debtor constitutes breach of the contract which gives rise to cause of action in the other party for damages, and any party injured by the rejection is deemed a creditor of the debtor holding a provable claim which will be treated on a parity with other similar claims. Bankr.Act, §§ 116(1), 202, 11 U.S.C.A. §§ 516(1), 602.

4. Bankruptcy Key 673

Doctor was not entitled to recover damages after his pathology contract with bankrupt hospital was judicially rejected where the contract was found to be in full force and effect until it was rejected, and the doctor had assigned the contract to another doctor before it was rejected, even if the assignment had been involuntary because of the activities of a prior receiver. Bankr.Act, §§ 116(1), 202, 11

U.S.C.A. §§ 516(1), 602.

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Charles M. Duecy (argued), of Duecy, Moore, Petsch & Robinson, Scottsdale, Ariz., John F. Sullivan, Phoenix, Ariz., for appellant.

Before ELY and HUFSTEDLER, Circuit Judges, and Ferguson,* District Judge.

PER CURIAM:

This case arises out of the Chapter X bankruptcy proceedings involving Maryvale Community Hospital, Inc., which are set forth in the opinion of this court filed this date entitled, "In the Matter of MARYVALE COMMUNITY HOSPITAL, INC., an Arizona corporation, Debtor; HEALTH FACILITIES PLANNING COUNCIL, an Arizona nonprofit corporation, Appellant v. FRANK J. DUNNING, as Trustee of the Estate of said Debtor, Appellee; GARY K. NELSON, the Attorney General of the State of Arizona, Appellant v. FRANK J. DUNNING, as Trustee of the Estate of said Debtor, Appellee", Numbers 25,586 and 25,587, 456 F.2d 410.

Here, the appeal is from a judgment entered in those proceedings by the district court in favor of Dr. Theodore E. Bratrud against the Chapter X trustee in the amount of $90,000. We reverse.

The following relevant facts govern this appeal:

1. On October 25, 1962, Dr. Bratrud, appellee herein, and Maryvale Hospital executed an agreement pursuant to which Dr. Bratrud became the pathologist for the hospital for a term of five years.

* Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

2. In July, 1963, upon a default in payments to the hospital's bondholders, the indenture trustee filed a state court action for an accounting and the appointment of a receiver to manage the hospital.

3. On July 31, 1963, co-receivers, one of which was Fred Foster, were appointed by the state court.

4. The next day, five of the bondholders filed a petition in federal district court for reorganization of the hospital under Chapter X of the Bankruptcy Act.

5. On November 26, 1963, the state court action was dismissed, and pending the approval of the Chapter X petition, Mr. Foster was appointed receiver of the hospital by the district court.

6. On May 11, 1964, the district court approved the Chapter petition and appointed Mr. Roland Wilpitz as trustee. Subsequently, Mr. Wilpitz resigned, and Mr. Dunning, the appellant herein, was appointed as his successor.

7. Meanwhile, while he was the interim Chapter X receiver, Mr. Foster filed a petition in the district court alleging that during the previous state court receivership disputes had arisen between the state receivers and Dr. Bratrud concerning the termination of the pathology contract. Mr. Foster sought an order to restrain Dr. Bratrud from performing any activities at the hospital.

8. On February 18, 1964, the district court issued a temporary restraining order preventing Dr. Bratrud from occupying the pathology laboratory, and an order to show cause why a preliminary injunction should not be granted.

9. After a trial, a judgment was entered which set forth:

forth:

(a) Dr. Bratrud and the hospital entered into the pathology contract on October 25, 1962.

(b) On October 28, 1963, in the state court action by the indenture trustee, an order was made purporting to terminate the contract.

(c) However, the contract was still in full force and effect and binding upon Mr. Foster as the Chapter X receiver.

(d) The temporary restraining order was vacated and the petition for an injunction was denied.

10. Shortly thereafter, on June 15, 1964, Mr. Foster filed a final account and report and petition for allowance of fees. The district court referred these matters for hearing to the bankruptcy referee, as special master in the Chapter X proceeding. Dr. Bratrud filed exceptions to Mr. Foster's accounting and petitioned the court for the payment of the sum of $30,470.95 as the sum due him under the contract from August 1, 1963, through April 30, 1964.

11. On July 24, 1964, Trustee Dunning filed a petition to terminate the contract between Dr. Bratrud and the hospital pursuant to Section 116(1) of Chapter X of the Bankruptcy Act.

12. On August 11, 1964, an order was entered which permitted the trustee to terminate the contract, effective August 3, 1964, and, pursuant to Section 202, authorized Dr. Bratrud to present such claims for damages as he might suffer as the result of the rejection of the contract. The order provided that he be deemed a creditor in such amount as the court may subsequently determine. Dr. Bratrud at no time objected to the order permitting Trustee Dunning to reject the contract.

13. On February 9, 1965, the referee, with reference to Foster's accounting and Dr. Bratrud's claim in that proceeding, issued his order finding that Dr. Bratrud was entitled to the sum of $30,543.60 as money due him under the pathology contract from August 1, 1963 through April 30, 1964, and ordered Trustee Dunning to pay Dr. Bratrud that sum. Dr. Bratrud was paid such amount.

14. All of the preceding judgments and orders have become final.

15. On May 25, 1966, Dr. Bratrud filed a petition for an order to show

cause why Trustee Dunning should not pay damages for rejection of the pathology contract.

16. The district court referred this matter to the referee for hearing and determination. On June 8, 1966, the referee issued an order directed to Trustee Dunning to show cause why Dr. Bratrud's damages should not be paid out of the debtor's assets.

17. Trustee Dunning then moved to quash this order upon the ground, first, that the district judge had not fixed the time pursuant to Sections 196 and 197 of Chapter X for filing proofs of claims of creditors and that Bratrud, an unsecured creditor at best, was seeking a priority over secured creditors, and his petition was not timely; and, secondly, that the pathology contract had been assigned by Dr. Bratrud prior to the time for which he sought compensation and Dr. Bratrud, therefore, had no rights under it.

18. The referee conducted an evidentiary hearing on June 29 and 30, 1966, and then issued an order which determined that:

(a) On April 28, 1964, Dr. Bratrud had volun-

tarily assigned all his rights in the contract to Dr. Judson A. Davidson, which assignment became effective May 1, 1964.

(b) Neither Dr. Bratrud nor the debtor hospital had terminated the contract prior to that assignment.

(c) Dr. Bratrud wrote to Trustee Dunning that his pathology contract with the hospital had been terminated by mutual agreement.

(d) As the contract had been assigned by Dr. Bratrud prior to the order authorizing rejection, he could not be and was not damaged by the rejection.

19. Dr. Bratrud then filed a petition for review of the referee's findings. The sole issue certified to the district court was the finding by the referee that Dr. Bratrud's assignment of his contract was voluntary.

20. The district court, on review of the record, held that Mr. Foster, during the time that he was the state court co-receiver and federal court receiver, had breached the contract by his actions in preventing Dr. Bratrud from performing under it and evicting Dr. Bratrud from the hospital. The court held that because of Receiver Foster's acts, Dr. Bratrud was forced economically to assign the contract to Dr. Davidson, and the assignment was not voluntary as the referee had found. The district court entered a judgment vacating the referee's order and awarding Dr. Bratrud the sum of $90,000 against Trustee Dunning. This figure was determined by a formula for liquidated damages in the contract. It is from that judgment that the trustee appeals.

Section 116(1) of Chapter X of the Bankruptcy Act (11 U.S.C. § 516(1)) provides that "upon the approval of a petition, the judge may . . . permit

the rejection of executory contracts of the debtor . . . ." Section 202 (11 U.S.C. § 602) provides that "In case an executory contract shall be rejected pursuant . . . to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall . . . be deemed a creditor".

[1-3] After a court has approved a Chapter X reorganization petition, the trustee appointed in that proceeding must within a reasonable time recommend to the court whether to adopt or to reject the debtor's executory contracts. Philadelphia Co. v. Dipple, 312 U.S. 168, 61 S.Ct. 538, 85 L.Ed. 651 (1941). By the terms of Section 116(1), the power to reject such contracts resides only in the judge before whom the reorganization proceeding is pending, and not in the receiver, the trustee or the referee to whom the proceeding may be generally referred. Matter of Cheney Brothers, 12 F.Supp. 605 (D.Conn.1935). Where a contract is rejected pursuant to Sec-

tion 116(1), the rejection is effective immediately and for all purposes. 6 Collier, Bankruptcy ¶ 3.24 [1], at 591-92 (1969). A rejection constitutes a breach of the contract which gives rise to a cause of action in the other party for damages. Workman v. Harrison, 282 F.2d 693 (10th Cir.1960); Matter of United Cigar Stores Co. of America, 89 F.2d 3 (2nd Cir.1937). By virtue of Section 202, any person injured by the rejection is deemed a creditor of the debtor holding a provable claim which will be treated on a parity with other similar claims. Matter of Greenpoint Metallic Bed Co., Inc., 113 F.2d 881 (2nd Cir.1940).

[4] Applying these principles, it is clear that the district court erred in awarding Dr. Bratrud $90,000. We begin with the fact that the pathology contract

was in full force and effect until it was rejected by the order of August 11, 1964. Prior to that time Receiver Foster had petitioned to exclude Dr. Bratrud from the hospital. However, the district court found specifically that the state court order which purported to terminate the contract was invalid, and that the contract was in full force and effect. Therefore, that part of Section 202 which refers to an executory contract having been rejected by a "receiver in equity in a prior pending proceeding" is not applicable to this case. Furthermore the order of August 11, 1964, permitting the trustee to reject the contract, was in itself an implicit finding that the contract was still in effect on that date.

Dr. Bratrud does not challenge the finding of the referee, which was not found otherwise by the district court, that Dr. Bratrud assigned all his right, title and interest in the pathology contract to Dr. Davidson for valuable consideration on April 28, 1964. He does not contend that the assignment is voidable, and he has taken no action to vacate that assignment. It thus appears, as the referee found, that Dr. Bratrud had no right in the contract at the time it was rejected.

When the pathology contract was rejected pursuant to Section 116(1), Dr. Bratrud became a creditor of the debtor hospital as provided in Section 202, and was entitled to recover in the Chapter X proceeding any damages he suffered as a result of such rejection. Dr. Bratrud has maintained throughout these proceedings that the purpose of his action was, and is, to recover damages as a Section 202 creditor. The referee applying traditional contract principles, found that the appellee had suffered no damages as a result of the rejection of the pathology contract because he had no right or interest in the contract at the time it was rejected. We agree.

The district court misconstrued the nature of appellee's action. The sole question certified to the district court on review was whether the assignment

from Dr. Bratrud to Dr. Davidson was voluntary. After reviewing the activities of Receiver Foster with regard to appellee, the court concluded that the assignment was involuntary and the result of economic coercion by the receivers, and that the "cause of action arose when the contract was breached [by the receivers] and [Dr. Bratrud] was prevented from fulfilling his part of the agreement". As a matter of law, however, the cause of action under Section 202 arose on August 11, 1964, when the trustee was authorized to reject the contract. That statement by the district court is, in effect, a finding against receiver Foster for tortious interference with the contractual arrangements between Dr. Bratrud and the hospital. Any damages to appellee which may have resulted from such conduct cannot properly be considered within the context of proceedings for damages resulting from the approved rejection of the contract. The district court improperly turned a hearing on a claim for damages for judicial rejection of the contract into a judgment against the trustee by reason of tortious conduct of the receiver.

The question of what motivated Dr. Bratrud to assign his contract is irrelevant for the purpose of determining

damages for an authorized rejection. No section of the Bankruptcy Act has been cited to this court which provides that an involuntary trnasfer may be disregarded in a proceeding for damages for a Section 116(1) contract rejection. Such a rule could lead to the inequitable situation where two claimants seek damages for rejection on a specific date of a single contract which had been assigned sequentially and for valuable consideration between them.

Although bankruptcy proceedings are equitable in nature, Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939); Local Loan Co. v.

Hunt, 292 U.S. 234, 240, 54 S.Ct. 695, 78 S.Ct. 1230 (1934), equity cannot be stretched to the point of permitting a proceeding for damages caused by the rejection of a contract by a trustee to result in damages for alleged tortious conduct while the contract was in effect.

The judgment is reversed and the cause is remanded to the district court with directions to issue its judgment affirming the order of the referee.

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Appendix

(6)

STATUTES and RULES INVOLVED

Section 116(1) (11 U.S.C. 516)

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court --

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;" * * *

Section 196 (11 U.S.C. 596)

"After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court."

Section 202 (11 U.S.C. 602)

"In case of executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor. * * *"

11 U.S.C. following Section 53

"General Order 47 of the Bankruptcy Order provides:

> Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.)

Rule 52(a)

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.)

Rule 53(a)

"(a) Appointment and Compensation. Each district court with the concurrence of a majority of all judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, an examiner, a commissioner, and an assessor. * * *"

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.)

Rule 53(e)(2)

"(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction."